APPENDIX

A

JUDGMENT, CIRCUIT COURT:

RUFFIN v. TURNER, DIRECTOR, CENTRAL INTELIGENCE AGENCY, ET AL., No. 80-2337 (D.C. Cir.)

Not To Be Published - See Local Rule 8(f)

UNITED STATES COURT OF APPEALS

FOR THE DISTRICT OF COLUMBIA CIRCUIT

[No Opinion]

No. 80-2337 September Term, 1981

Shirley J. Ruffin,

v.

Stansfield Turner, Director, Central Intelligence Agency, et al.

United States Court of Appeals for the District of Columbia Circuit

FILED FEB 24 1982

GEORGE A. FISHER
Clerk

Appeal from the United States District Court for the District of Columbia.

BEFORE: BAZELON, Senior Circuit Judge, WALD and GINSBURG, Circuit Judges.

JUDGMENT

This case was considered on the record on appeal from the United States District Court for the District of Columbia

and was briefed by counsel. The issues presented have been accorded this court's full consideration; they occasion no need for an opinion. See D.C. Cir. R. 11(d), 13(c). For the reasons set forth in the accompanying memorandum, it is

ORDERED and ADJUDGED that the judgment from which this appeal has been taken is affirmed.

Per Curiam

For the Court

/s/ George A. Fisher

George A. Fisher
Clerk

Bills of costs must be filed within 14 days after entry of judgment. The Court looks with disfavor upon motions to file bills of costs out of time.

No. 80-2337 -- Shirley J. Ruffin v. Stansfield Turner, Director, Central Intelligence Agency

MEMORANDUM

Following a four-day trial of appellant Ruffin's Title VII claims, the district court entered findings for appellee Turner. From the facts found, the district court concluded that 1) no race or sex based adverse employment action was taken against Ruffin, 2) Ruffin had not established a prima facie case of reprisal against her for activity protected by Title VII, 3) even if Ruffin had established a prima facie case, Turner presented legitimate, nondiscriminatory reasons for the actions taken with respect to Ruffin.

On appeal, Ruffin does not challenge the district court's determination of her Title VII claims; her contest here is confined to the pre-trial dismissal of her claims, all related to race and sex discrimination in her federal employment, "founded directly on the Constitution." Brown v. General Services Administration, 425 U.S. 820, 835 (1976), held Title VII "the exclusive judicial remedy for claims of discrimination in federal employment" encompassed by that legislation. Brown's rationale, this court has stated, places a federal employee protected by Title VII on a single track; "a federal employee who is covered by [Title VII] may not sue under ... the Fifth Amendment." Torre v. Barry, No. 80-1400, slip op. at 6 (D.C. Cir. Aug. 4, 1981), citing Richardson v. Wiley, 569 F.2d 140, 141 (D.C.

Cir. 1977). But cf. Carlson v. Green, 446 U.S. 14, 30-31 (Burger, C.J., dissenting).

Moreover, the district court's findings, which Ruffin has not assailed and reasonably could not assail as clearly erroneous, support the district court's conclusion that plaintiff had failed to establish any race or sex based adverse employment action or reprisal. Therefore, even if Title VII did not exclude other judicial remedies for federal employment discrimination, Ruffin would not be entitled to relief.

APPENDIX

B

FINDINGS OF FACT AND CONCLUSIONS OF LAW AND ORDER

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

SHIRLEY J. RUFFIN,)
)
Plaintiff,)
)
vs.) Civil Action No.
) 79-1523
STANSFIELD TURNER,)
)
Defendant.)

FILED
SEP 29 1980
JAMES F. DAVEY,
Clerk

FINDINGS OF FACT AND CONCLUSIONS OF LAW

FINDINGS OF FACT

1. Plaintiff, a black female, began working for the Central Intelligence Agency (CIA) in 1963 as a keypunch operator.

2. In 1968 plaintiff was reassigned to a position as an illustrator in the National Photographic Interpretation Center.

3. Plaintiff applied for and was of-

fered a position as an illustrator in the Graphics Branch, Imagery Analysis Service (later redesignated as the Office of Imagery Analysis (OIA)) where she started working in January, 1975.

4. Plaintiff was a GS-7 upon entering the Graphics Branch and was promoted rapidly, to a GS-8 in July, 1975 and to a GS-9 in September, 1976. The GS-9 level was the highest level plaintiff could obtain in the Graphics Branch unless she became a supervisor.

5. In January, 1975 the Graphics Branch consisted of plaintiff, two black male illustrators, one white male illustrator and a black male branch chief as supervisor, Granville Woodson. Sometime in 1977, Bridget Gray, a black female, joined the Graphics Branch as a part-time employee. [2]

Race and Sex Discrimination Claim

6. In a formal complaint of race and sex discrimination dated April 30, 1978, plaintiff charged that she was the victim of three incidents of discrimination: (1) the contents of plaintiff's fitness report for the period ending November 1, 1977; (2) the conversation between Mr. Woodson and plaintiff regarding plaintiff's Letter of Instruction; and (3) the reaction of the office chief to an April 30, 1978 incident report prepared by the Office of Security on plaintiff's behavior toward a security officer. In addition, plaintiff claimed that males in the Graphics Branch subjected her to various gross and insulting remarks.

7. The fitness report contained Mr. Woodson's and Rebecca Donegan's (Mr. Woodson's supervisor) evaluations of plaintiff's

performance for the period July 1, 1976 through September 30, 1977. Plaintiff is described as a very capable illustrator whose performance has been uneven on occasion because of her unruly behavior. Plaintiff's overall performance rating was proficient, the same rating she received from Mr. Woodson on each of her prior two fitness reports. Ms. Donegan had also concurred in plaintiff's proficient rating for the prior year.

8. There is no evidence whatsoever indicating that the contents of the fitness report are discriminatory or were written to discriminate against plaintiff.

9. A Letter of Instruction (LOI) is an administrative memorandum in which an employee is informed as to what is to be expected of him/her in the year ahead. Mr. Woodson prepared the LOI for plaintiff.

Plaintiff did not agree with some of the contents of her LOI, especially with the reference to the need for cooperation among the Graphics Branch illustrators and between the illustrators and editors and analysts. The comments with regard to such cooperation were contained in the LOI of each illustrator in the Graphics Branch. Plaintiff would not sign her LOI.

10. On two occasions Mr. Woodson attempted to speak with plaintiff about LOI. Plaintiff was loud, argumentative and abusive to Mr. Woodson. During the second occasion, plaintiff raised her voice

[3]

in such hostility to Mr. Woodson that employees some distance away from the Graphics Branch could hear plaintiff's verbal assualt on Mr. Woodson.

11. There is absolutely no evidence

that Mr. Woodson's efforts to communicate with plaintiff about her LOI were in any manner discriminatory. To the contrary, Mr. Woodson was unable to communicate effectively with plaintiff about her LOI because of plaintiff's own conduct.

12. On April 28, 1978, plaintiff met with Noel Firth, Director of OIA, to discuss her LOI. Mr. Firth was discouraged after his conversation with plaintiff. First, it appeared to Mr. Firth that it would be almost impossible for an effective relationship to exist between plaintiff and Mr. Woodson. Second, plaintiff would not accept the slightest criticism or acknowledge that there was any room for improvement in her performance.

13. Plaintiff attempted to gain access to the building in which she worked on April 30, 1978, a weekend. The secur-

ity officer, Gary Baron, would not allow plaintiff into the building since she was not on the Vault Access Roster. Because she was not permitted entry, plaintiff directed a number of abusive remarks to Mr. Baron. Mr. Baron did not raise his voice at plaintiff or direct any abusive comments toward plaintiff.

14. Several days later, Mr. Baron was leaving the security office when plaintiff saw him in the hallway of the building. Mr. Baron said nothing to plaintiff. Yet, in front of many other people, plaintiff raised her voice and began yelling at Mr. Baron, calling him, among other things, a dummy.

15. Mr. Firth was clearly justified in reprimanding plaintiff because of her conduct toward Mr. Baron. There is no evidence that suggests plaintiff was discrim-

inated against on account of the reprimand.

16. No male employee of the CIA made any sexual advances toward plaintiff. There is no evidence that Mr. Woodson or any other.

[4]

male in the CIA imposed or attempted to impose on plaintiff any sexual conduct as a term or condition of employment. There is no evidence to indicate that plaintiff was sexually harassed. It is clear that the atmosphere which frequently prevailed in the Graphics Branch can only be characterized as earthy and vulgar and more redolent of the barnyard than a well-run government office. It is also clear from an abundance of testimony that plaintiff is not a person of undue sensitivity and by her own conduct contributed to the conditions she claims to be objectionable.

17. Beginning in late 1976, plaintiff was having increasing difficulty getting along with other people, both inside and outside the Graphics Branch. Some editors and analysts did not want to work with plaintiff because of the abusive manner in which plaintiff treated them. One of the problems in dealing with plaintiff was that she would not admit to ever making a mistake or error and claimed that somebody else was always at fault. Plaintiff would also make derogatory comments about people, including her supervisors.

18. Plaintiff did not like Mr. Woodson. This attitude was reflected in the hostile manner in which she treated him and she comments she made about him when he was not present. In the months preceding plaintiff's departure from the CIA, Mr. Woodson could not even communicate

with plaintiff because of her attitude toward him.

Reprisal Claims

19. On June 23, 1978 plaintiff filed a complaint of reprisal based on a meeting held on June 19, 1978 between Ms. Donegan, Mr. Woodson and herself.

20. The June 19th meeting was held to discuss plaintiff's performance because plaintiff had requested, through her EEO counselor and in her version of the LOI, that she receive frequent feedback on her work.

21. At the June 19th meeting Ms. Donegan mentioned that plaintiff had made several errors on one project and had taken an inordinate length of time to complete another project. Plaintiff would not acknowledge any flaws in her performance and implied that someone

[5]

else was responsible for the errors and the delay. In addition, Ms. Donegan expressed her concern about the lack of communication between plaintiff and Mr. Woodson. Plaintiff's attitude toward Mr. Woodson was quite evident at this meeting as she would not acknowledge Mr. Woodson's presence at the meeting and referred to him as "that person." At the conclusion of the meeting Ms. Donegan advised plaintiff that her performance had deteriorated to the point that if she did not improve her performance she could not be given a proficient rating on her next fitness report.

22. The meeting of June 19, 1978 was not an adverse employment action and there is no evidence that a causal connection or nexus existed between plaintiff's participation in the EEO process and the meeting.

23. Plaintiff filed a second reprisal claim on August 3, 1978 alleging reprisal because she was requested to take a fitness for duty examination, including a psychiatric examination.

24. In June, 1978 Mr. Firth requested that the Personnel Evaluation Board (PEB) convene to consider plaintiff's conduct and to assist him in resolving the situation which plaintiff's conduct presented. This request was made by Mr. Firth for two reasons. First, plaintiff had been unable to develop effective working relationships with other individuals and defied authority. There was no communication between plaintiff and her supervisor, Mr. Woodson. As a result, morale in the Graphics Branch had been affected. Second, Mr. Firth had recently attended a security reindoctrination briefing where he was struck by the

similarity of plaintiff's behavior with that exhibited by a former CIA employee, Edwin Moore, who later transmitted classified material to the Soviet Union. Mr. Firth thus believed that plaintiff's conduct might have security implications.

25. On July 7, 1978, after hearing Mr. Firth's presentation regarding plaintiff and the problems her behavior presented, the PEB decided that plaintiff should undergo a fitness for duty examination.

26. On July 24, 1978, the PEB met again and decided that because of plaintiff's continued behavior and a desire to await the results of the fitness for duty examination, plaintiff should be placed in a non-duty pay status, which status became effective July

[6]

6, 1978.

27. Plaintiff refused to take the examination.

28. On August 1, 1978 plaintiff and her attorney met with John Rizzo, CIA Assistant General Counsel. Plaintiff was shown the CIA regulations regarding fitness for duty examinations. Mr. Rizzo told plaintiff that the examination was in her and the agency's best interest and that taking the examination did not mean that any administrative action would be taken against her after the completion of the examination. Plaintiff did not want to be examined by CIA physicians and Mr. Rizzo agreed to ascertain whether plaintiff could select her own physicians for the examination.

29. Several days later Mr. Rizzo was able to determine that the CIA would follow Civil Service Commission regulations on this matter which would allow plaintiff to choose

her own physicians as long as they were board certified and acceptable to the CIA. After some delay in reaching plaintiff's attorney, Mr. Rizzo communicated this position to him. Plaintiff submitted to the CIA the names of two physicians but one was not board certified. Before anything else occurred with respect to this situation, plaintiff resigned on September 20, 1978.

30. Other employees of the CIA, black and white, male and female, have been requested to take fitness for duty examinations. Many employees continued their employment at the CIA for years after taking such an examination.

31. Ordering plaintiff to take a fitness for duty examination was not an adverse action and there is no evidence that a causal connection or nexus existed between

plaintiff's participation in the EEO process and plaintiff's being requested to take a fitness for duty examination and plaintiff's resignation from the CIA.

CONCLUSIONS OF LAW

Race and Sex Discrimination Claims

1. Plaintiff brings this action under Title VII of the Civil Rights Act of 1964, as amended, 42 U.S.C. § 2000e-16. [7]

2. The standards which plaintiff must meet to establish an entitlement to relief under Title VII are set forth in Furnco Construction Corp. v. Waters, 438 U.S. 567 (1978) and McDonnell Douglas Corp. v. Green, 411 U.S. 792 (1973). Plaintiff has not met her initial burden of making out a prima facie case of discrimination. Plaintiff has not shown that she suffered

disparate treatment as a result of any of the actions she has complained of in this suit. Even if we assumed that plaintiff did make a prima facie showing, the CIA has articulated legitimate, nondiscriminatory reasons for any actions taken with respect to plaintiff. See Board of Trustees of Keene State College v. Sweeney, 439 U.S. 24 (1978).

Reprisal Claims

3. Plaintiff's claims of reprisal are also brought under Title VII.

4. The burden of proof allocations set forth in Furnco and McDonnell-Douglas also apply to plaintiff's claims of reprisal. To make out a prima facie case of retaliation plaintiff must show that she participated in a statutorily protected process; that defendant was aware of such participation; that contemporaneous with

or subsequent to the protected activity, an adverse employment action was taken against plaintiff; and that there was a causal connection between the participation in the protected activity and the adverse employment action. Morgan v. Goldschmidt, Civil Action No. 78-1041 (D.D.C. Feb. 27, 1980).

5. No adverse employment action was taken against plaintiff. Plaintiff has not shown that a causal connection existed between her participation in an activity protected by Title VII and any actions taken by defendant. Accordingly, plaintiff has failed to establish a prima facie case of reprisal. Even if we assumed plaintiff did make a prima facie showing, defendant has articulated legitimate, non-

[8]

discriminatory reasons for any actions tak-

en with respect to plaintiff.

6. Judgment is entered in favor of defendant and this action is hereby dismissed.

An order consistent with the foregoing has been entered this day.

/s/ J.H. Pratt
John H. Pratt
United States District Judge

September 26th, 1980.

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

SHIRLEY J. RUFFIN,	)	
	)	
Plaintiff,	)	
	)	
vs.	)	Civil Action No. 79-1523
	)	
STANSFIELD TURNER,	)	
	)	FILED
Defendant.	)	SEP 29 1980
		James F. Davey, Clerk

ORDER

After a non-jury trial and upon consideration of the findings of fact and conclusions of law submitted, it is this 26th day of September, 1980

ORDERED that judgment be and the same hereby is entered in favor of the defendant and the case be and hereby is dismissed.

/s/ J.H. Pratt
John H. Pratt
United States District Judge

APPENDIX

C

EXCERPT OF THE PROCEEDINGS (STATUS CALL) IN RUFFIN v. TURNER, ET AL., FEBRUARY 7, 1980, BEFORE THE HON. JOHN PRATT, UNITED STATES DISTRICT JUDGE. (P. 3, line 20 to P. 6, line 7)

THE COURT: We are going to have to have another status call.

Mr. Ontell, we have considered Mr. Kogan's partial motion to dismiss and we have concluded that all of the claims, including your constitutional claims with the exception of the Equal Pay Act, in the Title VII context very properly should be [4]
dismissed, and that's following the reasoning of Judge Flannery in Pace v. Matthews. (sic)

Let me elaborate. Count 1 alleges sex discrimination; that's Title VII. Count 2 alleges raise (sic) discrimination; that's Title VII. Count 3 alleges retaliation; that's Title VII. Count 4 alleges procedural violations of Title VII. Count 9, of course, provides a separate basis for jurisdiction. It relates to the Equal Pay

Act. And getting down ot the ones we haven't mentioned, Count 5 is entitled "Denial of Freedom of Association." That, clearly, is an issue of reprisal squarely covered by Title VII. The same can be said of Count 6, which is entitled "Denial of Freedom of Speech and Right to Petition," and in another context that would be a separate constitutional tort; but it is in this context a reprisal claim covered by Title VII; similarly with respect to Count 7, which is styled "Dischargeed." (sic)

So that for all of those non-Title VII claims, except for the Equal Pay claim and Title IX (sic), we are going to dismiss those and have prepared an order to that effect. All claims against the Defendant Turner in his individual capacity are dismissed. Admiral Turner as the head of the CIA can only be liable in his of-

ficial capacity, and therefore, the claims against him in his individual capacity are dismissed. Similarly, under the Brown case, the defendants, Firth, Lott, Donegan, since they are being sued in their individual capacity for

[5]

the various things that have been alleged against the Defendant Turner, claims against them in their individual capacity are also dismissed.

Now the claims against these same defendants, Firth, Lott, Donegan, in their official capacities, except the Equal Pay Act claim in Title IX (sic), are also dismissed. All claims for compensatory and punitive damages are dismissed.